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No. 04-1704

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
Petitioners,

v.

CHARLOTTE CUNO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* KENTUCKY CHAMBER OF COMMERCE, MICHIGAN CHAMBER OF COMMERCE, OHIO CHAMBER OF COMMERCE, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, DETROIT REGIONAL CHAMBER OF COMMERCE, AND TOLEDO AREA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION

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INTEREST OF *AMICI CURIAE*

This *amici curiae* brief in support of the petition of DaimlerChrysler Corporation is submitted pursuant to Rule 37 of the Supreme Court Rules.[1] Counsel for petitioners and respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The Kentucky Chamber of Commerce is the largest broad-based business association in Kentucky, representing more than 7,000 businesses.

The Michigan Chamber of Commerce is a non-profit membership organization which represents the interests and views of over 6,500 private corporations and businesses engaged in commercial, industrial, agricultural, civic and professional activities in Michigan.

The Ohio Chamber of Commerce, founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate.

The Tennessee Chamber of Commerce and Industry is the state chamber of commerce and manufacturers' association, representing more than 1,000 members across Tennessee from all facets of business and industry.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* states that no counsel for any other party authored this brief in whole or in part and that no entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

The Detroit Regional Chamber of Commerce is a non-profit business advocacy organization, representing more than 21,000 businesses in Southeast Michigan.

The Toledo Chamber of Commerce is a broad-based non-profit membership organization in Toledo, Ohio, which represents more than 3,800 businesses.

Each of the above-listed organizations works to enhance the economy and business climate of the State or region it serves. All have a collective interest in this case because the court of appeals' decision has created legal uncertainty which will diminish the value and effectiveness of business tax incentives in Kentucky, Michigan, Ohio, and Tennessee and will thereby hinder industrial development in those States.

INTRODUCTION

The Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, Tennessee Chamber of Commerce and Industry, Detroit Regional Chamber of Commerce, and Toledo Area Chamber of Commerce (the "Chambers") submit this brief as *amici curiae* to urge this Court to grant the petition filed by DaimlerChrysler, seeking *certiorari* pursuant to Rule 12 of the Supreme Court Rules. *Amici* submit this brief to make the Court aware of the confusion and uncertainty created by the court of appeals' decision, and the need for the Court to clearly resolve the issue inasmuch as the court of appeals has decided an important federal question in a manner which directly contradicts the holding of the Michigan Supreme Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

It would be difficult to overstate the adverse impact that the decision of the court of appeals in this case can be expected to have upon the economies of Tennessee, Kentucky, Ohio, and Michigan unless it is reversed by this Court. The court of appeals' decision represents a radical departure from existing Commerce Clause jurisprudence and fails to address the directly contrary holding of the Michigan Supreme Court in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992). Abandoning this Court's focus on whether a statute's economic impact places an impermissible burden on interstate commerce, the court of appeals' decision centers instead around a formalistic distinction between credits and subsidies. In so doing, the decision at once casts a general pall of doubt over all tax credit incentive programs in the Sixth Circuit while providing little guidance that businesses and State officials can use in crafting their incentive policies in a manner that can be depended upon by domestic and foreign investors. *Amici* therefore respectfully submit that this case presents "compelling reasons" for *certiorari* under Rule 10 of the Supreme Court Rules.

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF THE MICHIGAN SUPREME COURT.

The court of appeals' decision fails to address the directly contrary holding of the Michigan Supreme Court in *Caterpillar v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), which found that a virtually identical statute providing a tax deduction designed to encourage capital investment in Michigan did not violate the dormant Commerce Clause. The Michigan law at issue in *Caterpillar* provided a deduction from the State's business tax for "capital acquisitions related to the Michigan business activity." *Id.* at 186. Caterpillar, Inc. challenged the Michigan tax deduction, claiming that it discriminated against interstate commerce because it apportioned the deduction based only on the taxpayer's property and payroll, and excluded an additional factor—sales—used to calculate Michigan's business tax. *Id.* at 192. Thus, it was Caterpillar, Inc.'s contention that the deduction was unconstitutional because it discriminated against companies doing business in Michigan which did not locate their property and employees in Michigan. *Id.*

The Michigan Supreme Court rejected Caterpillar, Inc.'s argument, citing this Court's decision in *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991), and upheld the statute. Like the Ohio tax credit at issue, the Michigan deduction was designed to make Michigan attractive to investors vis-a-vis other States and to induce industrial investment there. The Michigan Supreme Court very directly rejected Caterpillar, Inc.'s contention that this statute "[wa]s

discriminatory because it was enacted to promote investment in Michigan," emphasizing that "States are free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Caterpillar*, 488 N.W.2d at 192 (quoting *Boston Stock Exch. v. State Tax Comm'n.*, 429 U.S. 318, 336-37 (1977)).

In so holding, the Michigan Supreme Court cautioned that "we must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize." *Id.* at 188, n. 25 (quoting *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444-45 (1940)). In this case, the court of appeals strikes down an Ohio statute that provides tax benefits for the same activity—investment in machinery—for the same purpose—inducing in-state investment—as that upheld in *Caterpillar*. Yet the court of appeals' opinion in no way addresses the Michigan Supreme Court's decision in *Caterpillar*, nor does it provide any basis whereby courts in the States comprising the Sixth Circuit[2] can harmonize the two dissonant decisions. Thus, the validity of a given incentive statute currently depends, at least in the State of Michigan and perhaps as well in Ohio, Kentucky, and Tennessee, entirely on whether it is challenged in State or federal court.

The court of appeals' decision in this case is in direct conflict with the decision of the Michigan Supreme Court in *Caterpillar*. This conflict presents a compelling reason for

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[2] State tax challenges typically come up through State courts. That the parties ended up in Federal Court in this case is an anomaly.

granting the petition for *certiorari* in this case in accordance with Rule 10(a) of the Supreme Court Rules.

II. THE UNCERTAINTY CREATED BY THE COURT OF APPEALS' DECISION PRESENTS A GRAVE AND IMMEDIATE THREAT TO ECONOMIC DEVELOPMENT WITHIN THE SIXTH CIRCUIT.

Regardless of how the Commerce Clause issue in this case may ultimately be decided, in the interim the four States comprising the Sixth Circuit will suffer the disadvantage of uncertainty in their efforts to induce industry to locate within their borders. There should be no doubt or mistake about the significance of the disadvantage under which these four States will labor. The availability of valuable tax incentives as an inducement to those who have the decision-making power to locate these manufacturing facilities and jobs in one State rather than elsewhere is a question of utmost public interest, not only to the businesses, but also to their employees and vendors, and to the communities in which they are located. The business people who decide where to invest substantial amounts of capital in locating or expanding manufacturing facilities need clarity and certainty of the law to determine with assurance the level of tax benefits available through the tax incentive legislation offered by a State. Uncertainty and doubt are the enemies of decision—and the citizens of Kentucky, Michigan, Ohio, and Tennessee are ill-served by doubt on the part of decision makers when the likely consequence of that doubt is either no decision to move to or expand jobs in those States, or a decision to locate (or even worse to relocate) in a State outside of the Sixth Circuit—or

even outside of the United States[3]—where the law critical to the decision path is free from doubt.

No doubt the legal academicians and well-meaning private citizens who are the proponents of the result so far reached in this case by the court of appeals believe that this result serves the greater good by leveling the playing field among the various States and avoiding the necessity that a State give up tax revenues by giving manufacturers tax credits as an incentive to locate manufacturing facilities in that State. However laudable, though misguided, that goal may be, the flaw is that the playing field they seek to level is the world, not just fifty States. The likely result of Ohio not being able to offer tax incentives to DaimlerChrysler to create or keep jobs in Toledo as a consequence of this case is not just that those jobs will migrate to Alabama or Georgia, but that they will likely leave the United States altogether. What is especially egregious about this "beggar thy neighbor" outcome is that by and large the tax incentives offered by the various States do not come out of existing State tax revenues, but represent tax revenues foregone from activity that would not occur in the State but for the tax incentives.

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[3] Decisions involving plant site locations for major multinational manufacturing corporations take into consideration not only United States sites, but sites in Mexico, Canada, and elsewhere.

III. THE COURT OF APPEALS' DECISION IS GROUNDED IN A FORMALISTIC DISTINCTION BETWEEN CREDITS AND SUBSIDIES—A RADICAL DEPARTURE FROM EXISTING COMMERCE CLAUSE JURISPRUDENCE WHICH INDISCRIMINATELY SHROUDS VIRTUALLY ALL TAX CREDIT INCENTIVE PROGRAMS IN THE SIXTH CIRCUIT WITH CONSTITUTIONAL UNCERTAINTY.

The court of appeals' opinion breaks new ground. Even though tax incentives similar to those implicated in this case have been in place for more than 20 years in many, if not most, States,[4] until the court of appeals' decision was issued neither any State supreme court, nor any federal court of appeals, nor this Court had ever held that a job creation/industrial investment tax credit incentive in the form at issue in Ohio violated the Commerce Clause. The court of appeals has acknowledged as much, noting that "[t]he United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes." *Cuno v. DaimlerChrysler*, 386 F.3d 738, 743 (2005). Literally billions of dollars have been invested in reliance upon and belief in the constitutional validity of the tax incentives provided by agreements of the sort at issue in this case.

If, as the court of appeals' decision suggests, an incentive's validity in the Sixth Circuit now turns, at least in

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[4] *See generally*, Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (May 1996) (noting *inter alia*, that "[t]oday, every state provides tax and other economic incentives as an inducement to local industrial location and expansion").

federal court, on the entirely formalistic distinction between credits and subsidies, then the court of appeals should have explained that important departure from existing law so that businesses and State officials could properly evaluate whether to begin the laborious process of re-crafting the numerous incentive programs that legislatures have enacted in the form of credits. As Professor Hellerstein observes in the Cornell Law Review article prominently quoted throughout plaintiffs' (respondents in this Court) briefs, there is no economic substance to the credits/subsidies distinction that, ultimately, is the touchstone of the court of appeals' decision. Hellerstein, *supra* note 4, at 21 ("Economists know that the real-world impact of such a subsidy mirrors the effect of the credit"). In recognizing that Ohio could have constitutionally granted subsidies to DaimlerChrysler with the same value as the tax credits it struck down as violative of the Commerce Clause, the court of appeals' decision breaks dramatically with this Court, which has explicitly and consistently "eschewed [such] formalism for a sensitive, case-by-case analysis of purposes and effects" when evaluating business incentives. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

Tellingly, the court of appeals' decision must resort to artificial distinctions because without them its opinion would plainly expand the Commerce Clause into areas of purely intra-state activity on which, as this Court has recognized, it has no bearing.[5] The decision accepts the plaintiffs' position

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[5] For example, in *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), this Court unanimously upheld the constitutionality of a state flat $100 fee on trucks engaged in intrastate commercial hauling. Out-of-state trucking companies which occasionally did "top offs" (short purely intrastate hauls) argued that the unapportioned fee

that the Ohio machinery credit at issue is unconstitutional because "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states." *Cuno*, 386 F.3d at 745. If that were the proper test, virtually any credit or subsidy or, for that matter, any road, convention center or other investment designed to make a State more advantageous to business investment vis-a-vis other States would be constitutionally suspect. As Justice Stevens has observed, the Constitution simply does not "inhibit a State's power to experiment with different methods of encouraging local industry" in this way; "*[w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.*" *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (emphasis supplied) (Stevens, J., concurring). What makes a statute unconstitutional under existing Supreme Court jurisprudence is the "burden" on interstate commerce resulting from protectionism through imposition of tariffs or toll-based duties on interstate sales and movements, such as the credit schemes struck down in *Maryland v. Louisiana*, 451 U.S. 725 (1981) and *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). This is the distinction so carefully articulated by this Court in *New Energy Co. of Ind. v. Limbach*; "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but *only action of that description in connection with the State's*

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discriminated against them because they paid the same amount as in-state companies that did nothing but intrastate hauls. This Court gave short shrift to this argument, observing that "[n]othing in [the Court's] case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause." *Id.* at 2421.

regulation of interstate commerce." 486 U.S. 269, 278 (1988) (emphasis supplied). By abandoning that crucial distinction, the court of appeals' decision throws the Commerce Clause jurisprudence within the Sixth Circuit into confusion and leaves State and private actors with no economically meaningful test for determining the validity of any given incentive statute.

IV. AS IN *QUILL CORP. V. NORTH DAKOTA*, THIS COURT SHOULD DEFER TO CONGRESS THE COMMERCE CLAUSE PUBLIC POLICY ISSUES ARISING OUT OF STATE AND LOCAL BUSINESS TAX INCENTIVES.

By granting the petition of DaimlerChrysler and reversing the court of appeals, this Court can take into consideration the "substantial reliance" by countless industry and public officials on longstanding tax incentives and properly "leave essentially legislative judgments to the Congress" regarding the benefits and burdens on interstate commerce created by such incentives. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 877-898 (1988) (Scalia, J., concurring in Judgment). This Court should follow the fair and prudent course set by it in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In *Quill*, this Court was called upon to address whether the Commerce Clause prohibited States from taxing out-of-state mail order vendors. *Id.* Noting that existing precedents had "engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry," the Court declined to reverse its longstanding position that mail order businesses could not be taxed by States in which they had no physical presence. *Id.* at 317 (emphasis supplied). Important to this Court's determination was the recognition that

> [t]his aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our decisions.

Id. at 318. Would it therefore not be better that this Court similarly safeguard the reliance interests of manufacturers who have invested substantial sums induced to do so by significant tax incentives?

Certainly, the reliance interests implicated in this case are far weightier than those protected by this Court in *Quill*. *Quill* involved a single industry; the court of appeals' decision in this case calls into question a vast framework of incentives relied on by manufacturers operating in virtually every State in the Union. *See* Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997).

As in *Quill*, this Court should grant certiorari and reverse the decision below, thereby leaving to Congress the task of balancing these extensive reliance interests, as well as the significant economic benefits that have motivated State legislatures to adopt the incentives on which industries now rely, against the anti-incentive policy agenda advocated by the plaintiffs. While this case does not involve, as did *Quill*, a question of law as to which this Court has directly spoken, it does involve an issue as to which informed taxpayers could reasonably infer from this Court's precedents that tax incentives such as those at issue were well within acceptable limits set under the Commerce Clause. Even the plaintiffs concede that this Court's dormant Commerce Clause

jurisprudence does not directly mandate the court of appeals' decision to strike down the most commonly available type of business tax incentive in the United States. *See* Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL LAW REV. 789, 805 (1996). Indeed, the plaintiffs themselves characterize their position as a "novel legal theory." (No. 01-3960, *Cuno v. DaimlerChrysler Corp. (6th Cir.), Pl. Br. at viii)*.

This Court has recognized that "novel legal theories" of State taxation with broad national application are best tested, evaluated and enacted by Congress. *Quill*, 504 U.S. at 318 (refusing to adopt an "economic" rather than "physical" presence nexus requirement); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278-280 (1978) (refusing to mandate a formula to apportionment of income of multi-state enterprises on the grounds that such action would necessitate "extensive judicial lawmaking"); *see also, Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 621 (1997) (Thomas, J., dissenting) ("the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious State taxes on interstate commerce ... and leaves to Congress the policy choices necessary for any further regulation of interstate commerce"). As in *Quill* and *Moorman*, this Court should decline plaintiffs' invitation to impose such a novel legal theory on the States by judicial fiat and thereby avoid opening the Pandora's Box of when and to what extent the novel theory must or should be given retrospective effect. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *see also*, Hartman and Trost, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2D, § 7.5, pp. 64-104 (Thompson West, 2003)(analyzing cases addressing the validity of claims for retroactive relief).

Business development incentives are an area of law particularly suited to Congressional action. Unlike this Court, which must address the specific facts and statute at issue, Congress can create a national scheme which broadly addresses such incentives either by banning them or placing all or certain types of incentives in protected safe harbors.[6] Such a scheme will not only place States in all Circuits on an equal footing but will immediately increase the value of those incentives to both the States and the businesses that rely on them by eliminating the legal uncertainty created by the decision of the court of appeals. Congress is also in a unique position to address the reliance interests of those taxpayers that have made substantial investments in reliance on such incentives, often after evaluating opportunities in many competing States and nations. To the extent Congress agrees with the plaintiffs that, irrespective of the opinion of legislatures throughout the United States, certain incentives are bad public policy, it can readily enact "grandfather" or "sunset" provisions carefully tailored to preserve tax benefits for which taxpayers have already bargained.

A decision of this Court reversing the holding of the court of appeals will leave Congress, should it so choose, free to form a national policy on business development incentives. As this Court observed in *Quill*, "Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. In this situation, it may be that the better part of valor is to respect the judgment of the other branches of government." *Quill*, 504 U.S. at 318-319

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[6] A bill has been introduced in Congress to protect commonly used incentives, including credits for in-state investment of the sort challenged in this litigation, from Commerce Clause challenge. S. 2881, 109th Cong., 1st Sess. (2005).

(quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637-638 (1992)).

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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